



In the Matter of :

JEROME REID,

ARB CASE NO. 00-082

COMPLAINANT,

ALJ CASE NO. 2000-ERA-00023

v.

DATE: September 26, 2000

NIAGARA MOHAWK POWER CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**NOTICE OF REVIEW, BRIEFING SCHEDULE AND ORDER GRANTING
COMPLAINANT'S MOTION FOR AN ENLARGEMENT OF TIME**

Jerome Reid has petitioned the Administrative Review Board (ARB) to review the Administrative Law Judge's Recommended Decision and Order (R. D. & O.) issued on August 30, 2000, in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 (1994). Reid also requests a fifteen-day enlargement of time for filing his opening brief.

As provided in 29 C.F.R. §24.8(a) (2000), any party seeking review of an R. D. & O. has ten days to file a petition for review with the ARB. To be considered timely, the ARB must receive the petition within the ten-day period; in this case by September 14, 2000. The ARB received Reid's petition for review on September 15, 2000. Thus, it was not timely filed. Nevertheless, we accept it for filing.

The regulation establishing a ten-day limitations period for filing a petition for review with the ARB is an internal procedural rule adopted to expedite the administrative resolution of cases arising under the environmental whistleblower statutes. 29 C.F.R. §24.1 (2000). *Accord Gutierrez v. Regents of the University of California*, ALJ Case No. 98-ERA-19, ARB Case No. 99-116, Order Accepting Petition for Review and Establishing Briefing Schedule, Nov. 8, 1999, slip op. at 3. Accordingly, we have held that we have the authority to waive service and filing requirements in some instances, provided there is no prejudice to other parties. *See, e.g., Garcia v. Wantz Equipment*, ALJ Case No. 99-CAA-11, ARB Case No. 99-109, Order Accepting Petition for Review and Establishing Briefing Schedule, Feb. 8, 2000; slip op. 2-3 (petition received nine days late accepted because house-bound disabled *pro se* complainant could not send petition for review by fax or United Parcel Service); *Tri-Gem's Builders, Inc.*, ALJ Case No. 98-DBA-17, ARB Case No. 99-117, Order

Accepting Appeal and Establishing Briefing Schedule, Nov. 22, 1999, slip op. at 5 (reliance on ALJ's erroneous statement of appeal rights causing filing of appeal four days late justifies waiver of filing time limit); *Gutierrez v. Regents of the Univ. of Calif.*, *supra*, slip op. at 3-4 (filing timely appeal in wrong forum sufficient to put opposing party on notice and supports waiver of filing requirement);^{1/} *Duncan v. Sacramento Metropolitan Air Quality Management Dist.*, ALJ Case No. 97-CAA-12, ARB Case No. 99-011, Order Accepting Appeal and Establishing Briefing Schedule, Sept. 1, 1999, slip op. at 3 (same); *Superior Paving & Materials, Inc.*, ALJ Case No. 98-DBA-11, ARB Case No. 99-065, Order Accepting Petition for Review and Establishing Briefing Schedule, Sept. 3, 1999, slip op. at 3 (erroneous reliance on inapplicable regulation causing filing three days late justified waiver of time limit). In waiving the limitations period in *Superior Paving*, the ARB distinguished cases in which a waiver of the time limitation was not granted, such as a petition for review that was filed as much as five weeks late, or a case in which petitioners filed late and also had not complied with other time limits established by the ALJ, thus demonstrating a pattern of noncompliance with deadlines. Slip op. at 3.

Complainant Reid clearly attempted to comply with the 10-day filing requirement. He sent his petition for review to the ARB via United States Postal Service Express Mail on September 12, 2000, with the expectation that the Postal Service would deliver it no later than September 14, 2000. Through no fault of Reid's, the petition was not in fact delivered until September 15, 2000. As we noted in *Garcia*, "we are dealing here with a very short time limit for perfecting an appeal, one which would make it difficult even for a party represented by counsel to make a carefully considered decision to appeal an ALJ decision." Slip op. at 3. We conclude that the slight delay in filing the petition and service upon Respondent Niagara Mohawk Power Corporation (copy of the petition attached) did not prejudice Niagara Mohawk Power's interests. Therefore, we **ACCEPT** Reid's petition for review for filing and **GRANT** his request for a fifteen-day extension of time to file his opening brief. Accordingly, we establish the following briefing schedule:

1. Reid may file an initial brief, not to exceed thirty double-spaced typed pages, on or before **October 10, 2000**.
2. Niagara Mohawk Power may file a reply brief, not to exceed thirty double-spaced typed pages, on or before **November 9, 2000**.
3. Reid may file a rebuttal brief, responding exclusively to the reply brief and not to exceed 10 double-spaced typed pages, on or before **November 24, 2000**.

^{1/} In *Gutierrez* and other cases, the Board stated that it is guided by the principles of equitable tolling articulated in cases such as *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16 (3d Cir.1981). As we concluded in *Garcia*, "we view the grounds for equitable tolling stated in *Allentown v. Marshall* as alternative bases for waiver of internally established time limits under the authority of the Board to relax procedural rules in the interests of justice and in the absence of prejudice to other parties." Slip op. at 2, n.1.

All motions and other requests for extraordinary action by the Board (including, but not limited to, requests for extensions of time or expansion of page limitations) shall be in the form of a motion appropriately captioned, titled, formatted and signed, consistent with customary practice before a court. *See e.g., Fed. R. Civ. P. 7(b).*

All pleadings and briefs are expected to conform to the stated page limitations unless prior approval of the Board has been granted and should be prepared in Courier (or typographic scalable) 12 point, 10 character-per-inch type or larger, double-spaced, with minimum one-inch left and right margins and minimum 1.25-inch top and bottom margins, printed on 8 ½ by 11-inch paper. An original and five copies of all pleadings and briefs shall be filed with the Board.

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member